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CRIMINAL JUDGMENTS AS EVIDENCE IN CIVIL CASES

The current and enlightened trend in the law of evidence seems to be toward broader admissibility, based upon reasonableness and common sense rather than strict rules from the past. A result of this trend has been an occasional modification of the rule excluding all prior criminal judgments in subsequent civil suits when the fact of guilt is the precise fact sought to be proved by the offer of the prior judgment. The rule of exclusion was the early law in both England and the United States. Apparently England still follows the rule,¹ as do a majority of American jurisdictions; but inroads have been made in this country, and it appears that strict exclusion is a waning majority rule.

At present there are three different approaches used by the courts when determining whether criminal judgments are admissible.

1. The conviction or acquittal is excluded altogether, which is the present majority and traditional view.

2. The conviction is admitted as *prima facie* evidence of the facts stated therein, subject to rebuttal by contrary evidence. None of the cases espousing this view give presumptive weight to acquittals.

3. The conviction is accepted as *conclusive* of the facts stated therein, but this view has not been extended to acquittals. As a further limitation, the cases have confined this conclusive approach to a particular fact situation where the accused is seeking benefit from the act for which he was convicted.

The courts following the latter two views have never suggested that an acquittal be admitted so as to bar a subsequent civil action, unless perhaps the object of the subsequent suit is in fact to punish further the accused.² Acquittal in a criminal action merely means that the prosecution has failed to prove beyond a reasonable doubt the guilt of the accused. Such a strong measure of persuasion is not required of the parties in a civil action, so the prior acquittal could not reasonably be binding in the subsequent suit.

For a better understanding of the three approaches used by courts today, each will be considered separately.

COMPLETE EXCLUSION

The rule of complete exclusion which had its foundation in the

¹ *Hollington v. Hewthorn and Co.* [1943] 1 K.B. 587. The facts of this case are discussed in the text, *infra*.

² *Helvering v. Mitchell*, 303 U.S. 391 (1938). This case involved forfeiture in a civil action, and permitted the acquittal to be used on the grounds that punishment in the second proceeding would be double jeopardy.

early common law decisions is based on the theory that any judgment of conviction or acquittal is a decision in rem which estops the whole world from attacking the fact of conviction or acquittal but estops only the parties from afterwards raising the question whether the accused was in fact guilty or innocent. Therefore in a subsequent civil action one may, after having been convicted of a crime, assert his innocence and put his opponent to the proof of guilt. The doctrine of *res inter alios acta* — the issues of the proceeding are not identical — has been held applicable.³

The English courts still seem to follow this exclusion theory, as indicated by the recent case of *Hollington v. Hewthorn*.⁴ However, the fact situation in this case was not one which lent itself to the adoption of one of the more modern rules. The crime was a minor one involving vehicles, and traffic violation convictions may lack necessary probative value in a subsequent civil suit. Nevertheless, the complete exclusion rule was followed, and as a basis for the rule the English court gave the following reasons: (1) such evidence is not relevant, but is only the view of another court on the evidence, such evidence being unknown to the civil court; (2) *res inter alios acta* — the issues of the two proceedings are not identical; (3) the evidence would be hearsay, having been made outside of the civil proceeding and being offered as proof of the statements made therein; (4) evidence is only the opinion of the criminal court; (5) if the conviction should be admissible, acquittal should also be admissible, which has never been suggested.

These five arguments cover the most frequently stated reasons given in support of the exclusion rule.

1. In answer to the relevancy argument it may be said that relevant should mean logically probative, and a conviction in the ordinary criminal trial of the same offense in issue at a subsequent civil trial would be logically probative.

2. The answer to the *res inter alios acta* claim is that even if the issues are not identical, the accused has had sufficient opportunity to defend himself in a proceeding in which he was given more protection than he would receive in the civil trial. Any differences as to elements of proof, degree of proof, weight of evidence, or competency of witnesses are resolved in favor of the accused in the crim-

³ This is illustrated by the language in *Leyman v. Latimer*, 3 Ex. D. 352, 354 (1878): "It is plain . . . that a conviction for felony is *res inter alios acta*, and of itself is no evidence in any civil proceeding that the person convicted has committed a felony."

⁴ [1943] 1 K.B. 587.

inal trial. Therefore, there seems to be no prejudice of accused's rights in admitting the prior judgment.

3 & 4. The hearsay and opinion arguments apparently overlook the recognized exceptions to these rules. Such exceptions fully justify admission of a judgment of conviction in a subsequent civil action. Official documents are a recognized exception to the hearsay rule⁵ and there is no reason why the judgment could not be under the official document classification.⁶

5. As for the conviction-acquittal distinction, conviction indicates that the accused has been proved guilty beyond a reasonable doubt; acquittal simply means the prosecution has not met the requirement of proof of guilt beyond reasonable doubt.

The majority of American jurisdictions still follow the complete exclusion rule.⁷ It has been held, for example, that in an action on a life insurance policy, the record of the beneficiary's conviction of manslaughter for killing the insured was inadmissible, notwithstanding a statute precluding such a beneficiary from receiving the proceeds of the policy.⁸ Another case in direct conflict with the more modern authorities refused to admit a conviction of the insured for arson, and held that the guilt of the insured must be proved *de novo*.⁹

Texas courts have consistently followed this narrow rule of exclusion.¹⁰ They have failed to make any distinction between acquittal and conviction,¹¹ either type of judgment being excluded. In *Stewart v. Profit*,¹² an action in trespass to try title where the issue was whether a grantor was a white woman or a Negress, it was held that her conviction of marrying a Negro, she being a white woman, was not admissible in evidence. The case of *Fire Ass'n of Philadelphia v. Coomer*¹³ involved conviction of arson and the subsequent proceeding by the accused to collect insurance because of the fire. The court held that while the conviction might be introduced for the purpose of impeaching the insured's credibility as a witness, the

⁵ 5 WIGMORE, EVIDENCE 512 (3d ed. 1940).

⁶ *Id.* at 844, 845.

⁷ *Id.* at 687. See, e.g., *Interstate Dry Goods v. Williamson*, 91 W.Va. 156, 112 S.E. 301 (1922); *Washington Nat'l Ins. Co. v. Clement*, 192 Ark. 371, 91 S.W.2d 265 (1936); *State v. Fitzgerald*, 140 Me. 314, 37 A.2d 799 (1944); and *Commonwealth v. McMenamin*, 122 Pa. Super. 91, 184 Atl. 679 (1936).

⁸ *Goodwin v. Continental Cas. Co.*, 175 Okla. 469, 53 P.2d 241 (1939).

⁹ *Girard v. Vermont Mut. Fire Ins. Co.*, 103 Vt. 330, 154 Atl. 666 (1931).

¹⁰ MCCORMICK AND RAY, TEXAS LAW OF EVIDENCE, § 1279 (2d ed. 1956).

¹¹ *Smith v. White*, 216 S.W.2d 672 (Tex. Civ. App. 1948) *error ref. n.r.e.*

¹² 146 S.W. 563 (Tex. Civ. App. 1912) *error ref.*

¹³ 158 S.W.2d 355 (Tex. Civ. App. 1942).

judgment was not evidence that the loss was caused by insured, since the insurer was in no way a party to the criminal proceeding.

There are many Texas cases holding that an acquittal in a criminal prosecution will not affect a subsequent civil suit, the record of the criminal prosecution being inadmissible as evidence of the accused's innocence.¹⁴

PRIMA FACIE RULE

Under the prima facie rule the record of conviction in the criminal case is admissible in the subsequent civil case as prima facie evidence of the facts stated therein, thereby shifting the burden of disproving such facts to the accused.

The leading case giving a criminal judgment such presumptive force in a subsequent civil suit is *Schindler v. Royal Ins. Co.*,¹⁵ a New York case. The conviction was used defensively by the insurance company to prevent enforcement of what amounted to a reimbursement for the commission of a crime. Whether this presumption would extend to cases where the accused is a defendant has not been settled by the Court of Appeals in New York; the lower courts are in conflict.¹⁶

The prima facie theory recognizes the probative value of prior judicial determinations. As stated in *Sovereign Camp W.O.W. v. Gunn*,¹⁷ "To say all this is no evidence at all of [the accused's] guilt when that exact issue is presented again in a civil suit, is to say the same tribunals which conduct such proceedings shall give them no probative force in civil actions on technical grounds of want of mutuality. To so hold is to discredit solemn judicial findings in the forum of their rendition."

Possible arguments against this presumptive rule could be summarized as follows: (1) there is a difference in parties in the two suits; (2) there are variation in rules of evidence including competency of witnesses and degrees of proof; (3) it is questionable whether or not the average jury is able to comprehend the concep-

¹⁴ *Landa v. Obert*, 78 Tex. 33, 14 S.W. 297 (1890); *Simpson v. City of Houston*, 260 S.W.2d 94 (Tex. Civ. App. 1955) *error ref. n.r.e.*; *Pittman v. Stephans*, 153 S.W.2d 314 (Tex. Civ. App. 1941) *error ref. w.o.m.*

¹⁵ 258 N.Y. 310, 179 N.E. 711 (1932). Plaintiff sued on an insurance policy for fire loss. Defendant insurance company set up the fraud of plaintiff as a defense, *i.e.*, plaintiff had made false statement of loss and damage, and was convicted of presenting false and fraudulent proof of loss.

¹⁶ *Walther v. News Syndicate Co.*, 276 App. Div. 169, 93 N.Y.S.2d 537 (1st Dep't 1949); *Stanton v. Major*, 274 App. Div. 864, 82 N.Y.S.2d 134 (3d Dep't 1948); *Giessler v. Accurate Brass Co.*, 271 App. Div. 980, 68 N.Y.S.2d 1 (2d Dep't 1947); *Same v. Davison*, 253 App. Div. 123, 1 N.Y.S.2d 374 (4th Dep't 1937).

¹⁷ 227 Ala. 400, 150 So. 491 (1933).

tion of a conviction as being merely prima facie evidence. The difference of parties is of no material significance since the conviction will only be used against the original defendant who had an opportunity in the criminal trial to fully litigate the same issue involved in the civil case. As to variations in evidence, it has been pointed out in discussing the complete exclusion rule that all variations in evidence are in favor of the accused in the criminal trial. Finally, it seems doubtful that the jury would be less able to comprehend the presumptive force of the conviction than to comprehend the meaning of "preponderance of evidence" or "beyond a reasonable doubt." With proper instructions the problem would be minimized.

The only difference between the prima facie rule and the conclusive rule is the weight to be attached to the prior judgment. The presumptive weight applied to the former rule is justified in the *Gunn* case in the following language: "Since another party to civil suit, in no way bound by the results of the prosecution, is offering such record, the other party should not be entirely concluded and shut off from showing there was a miscarriage of justice in the criminal case."¹⁸ A practical application of this reasoning appeared in *North River Ins. Co. v. Militello*.¹⁹ On re-trial of the civil case, judgment was for the accused,²⁰ so although he was in prison at the time for the offense, he was still permitted to recover from the insurance company for the very act for which he had been convicted.

CONCLUSIVE RULE

The conclusive rule is generally applied defensively when the accused is seeking reimbursement for the very loss which he caused through the commission of the crime. The leading case setting forth this theory is *Eagle Star and British Dominions Ins. Co. v. Heller*.²¹ The court held that the criminal judgment was determinative unless proof of fraud or some other ground of invalidity could be shown. But there is a question whether the *Heller* doctrine would apply if the convicted person were a defendant in a civil case, and failure to use the judgment would not result in unjust enrichment. The court emphasized that this holding applied only to these facts, and no opinion was expressed as to the case of a personal injury action following a criminal conviction for the acts causing such injury. If the accused were not seeking unjust enrichment, public policy con-

¹⁸ 150 So. at 493 (1933).

¹⁹ 100 Colo. 343, 67 P.2d 625 (1937).

²⁰ 104 Colo. 28, 88 P.2d 567 (1939).

²¹ 149 Va. 82, 140 S.E. 314 (1927).

siderations would no longer be present. Even in Virginia, where the *Heller* decision was handed down, it does not appear that conclusive effect would be given in other situations.²²

Wigmore seems to favor the conclusive doctrine, observing that in many situations it is "unreasonable and impractical to ignore the evidential use of a judgment in another proceeding involving the same fact as in the present case."²³

Two other cases in support of this view are worthy of note. The first, *Poston v. Home Ins. Co.*,²⁴ held that conviction would be conclusive against one charged with theft of his own automobile and with using the mails to defraud in the filing of proof of loss under a policy against theft, since the court would not look with favor upon the right of a party to profit by his own criminal act. Here again the public policy argument controlled. In *Austin v. United States*²⁵ the facts were similar, and the court said, "We think no error was committed in holding the judgment was *conclusive* on the plaintiff." In arguing in favor of this view it may be said that it is more logical, in that where the conviction is not given conclusive effect there is danger either that the jury will give it such weight as to make it an irrebuttable presumption; or at the other extreme, it will be disregarded and directly contradicted. If the conviction is given conclusive weight, subject to discretion by the court as to whether the issue in the pending civil action was fully and fairly litigated and determined in the previous criminal trial, the accused is actually afforded protection equal to that under the *prima facie* rule. The discretionary element would eliminate the problem of evidence of minor convictions, because they would not in most cases pass the test of being fully litigated.

SUGGESTED LEGISLATION

Both the Model Code of Evidence and the Uniform Rules of Evidence have considered this problem, and have set forth proposed rules. The Model Code has suggested the broader rule: "Evidence of a subsisting judgment adjudging a person guilty of a crime or misdemeanor is admissible as tending to prove the facts recited therein and every fact essential to sustain the judgment."²⁶ In the comment following the rule, the Code recognizes that most courts reject such evidence, but states that when the accused has been found guilty

²² *Anderson v. Sisson*, 170 Va. 178, 196 S.E. 688 (1938).

²³ 5 WIGMORE, EVIDENCE 688 (3d ed. 1940).

²⁴ 191 S.C. 314, 4 S.E.2d 261 (1939).

²⁵ 125 F.2d 816 (7th Cir. 1942).

²⁶ MODEL CODE OF EVIDENCE rule 521 (1942).

beyond a reasonable doubt, the verdict has sufficient value to be considered by the civil court, and necessarily includes a finding of all facts essential to sustain the judgment in the particular case.

The Uniform Rules provide a rule which would probably be accepted more readily by the courts, *i.e.*, the admission of "evidence of a final judgment adjudging a person guilty of a *felony* to prove any facts essential to sustain the judgment." (emphasis added)²⁷ Misdemeanors are excluded because they are less trustworthy, especially traffic violations when used to prove negligence.

CONCLUSION

The traditional rule of exclusion, although still the majority rule, is being modified and changed in an ever increasing number of jurisdictions. The forms this modification takes are varied, usually depending on the fact situation involved. Where public policy interest is strong, as in cases of unjust enrichment, the criminal judgment has been held conclusive in the civil suit; but when the court fears to take such a broad step a presumption is given to the prior judgment which shifts the burden of proof. It is submitted that either approach is an improvement over the exclusion rule, and that with proper procedural safeguards protecting the accused in case of a fraudulent criminal judgment, the conclusive rule would tender the more satisfactory results. Since our criminal trials now offer an accused a maximum protection of his rights, the need for the exclusion rule has disappeared, and common sense calls for the admission of prior judgments when the same issue is again being litigated.

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²⁷ UNIFORM RULES OF EVIDENCE rule 63 § 20 (1950).